Supreme Court, U.S.
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No._____

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In The

Supreme Court for the United States

October Term, 1995

BRUCE BUCHBINDER

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE BUCHBINDER
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Petitioner In Pro Se

30 pp

QUESTIONS PRESENTED

1. Whether the arbitrary dismissal of a litigant's cause of action before the Courts, especially an action being brought by a Pro Se Litigant, is the harshest sanction that can be imposed by the Courts, and whether such a sanction can rise to the level of a denial of proper Due Process, and Right to meaningful access to the Courts?

2. Whether a Court imposed monetary sanction for an allegation of misconduct that never actually took place, coupled with a subsequent sanction of dismissal, would rise to the level of judicial usurpation, giving proprietorial necessity for this Court to invoke its appellate jurisdiction of review in order to curb further usurpations of this nature?

3. Whether an individual Pro Se Litigant has a Ninth Amendment right to refuse to pay a Court imposed sanction for an allegation of misconduct that never actually took place, barring being denied access to the Courts?

4. Whether, under Estoppel by Laches, Respondent's failure to respond in the face of petitioner's asserted facts and conclusions, pursuant to Rule 15.1, constitutes a default concession to the validity of petitioner's claim, notwithstanding the outcome of petitioner's petition?

5. Whether Respondent's failure to respond to petitioner's statements of law and fact, pursuant to Rule 15.1 and 15.5, constitutes a default by waiver, thus triggering Estoppel by Laches and overthrowing Respondent's basis in the lower courts, considering Respondent did not protect this basis by bringing to the Court's attention that petitioner's issues were not proper issues to bring before the Court, and by not bringing to

the Court's attention that petitioner's assertions had no valid basis in the record and raised no valid Due Process issue?

6. Whether the waiver filed in Supreme Court case Docket No. 94-620, where the waiver filed by Respondent pursuant to Rule 15.1 and 15.5 effectively creates an Estoppel In Pais and an Estoppel In Laches, thereby preventing Respondent from any further action, attaches to the instant case to which it is bound?

7. Does an irreconcilable contradiction exist in the United States Judicial system wherein the issues are not reviewed by the lower courts pursuant to Title 5, United States Codes, sections 554, 556, 702, 703, and 706, and the Highest Court of the Land refuses to grant certiorari, review the issues, and close the question in keeping with Amendments I and V of the Constitution, or in the alternative does the Waiver create a default condition and thereby resolve this contradiction?

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PRELIMINARY STATEMENT

In this case Petitioner Buchbinder has been severely punished for an allegation of misconduct before the Ninth Circuit Court of Appeals, which allegation of misconduct never actually took place, and the punishment is so extreme that Buchbinder has been substantially denied access to meaningful judicial review of his case.

In the past few years the American Public has begun to question the validity of the taxing powers being imposed upon them. These questions have brought a hysterical response from the IRS agency who administers these tax provisions.

Through the Croasman Memorandum and IRS seminars conducted for the benefit of Federal Court Judges, these Judges have become accustomed to turning their face against any politically unpopular argument involving taxation. It has now become judicially expedient to merely deem any unpopular tax argument a frivolous and groundless argument, and dispense with the case without any semblance of judicial review, and it is this expedience Petitioner Buchbinder has found himself the victim of.

Additionally this case involves an issue of a Waiver filed in a previous Supreme Court case, to which the instant case is bound, wherein Respondent in the previous case, knowingly and without coercion waived his right to file in the face of Petitioner's asserted facts and conclusions; Respondent thereby defaulting by waiver, pursuant to Supreme Court Rule 15.5; Respondent further failing to object in a timely fashion to Petitioner's claim of default by Waiver (Respondent Nolo/Contendere/Non Prosequitur/Estoppel In Pais/Estoppel by Laches). This issue also involves a question of whether such

waiver attaches to the instant case from the case to which it is bound.

OPINIONS BELOW

The Orders of the Court of Appeals for the Ninth Circuit have not been reported. They are copied and attached to the appendix hereto, APP. A & C, *infra.* The Order and Order and Decision of the United States Tax Court has been reported. It is copied and attached to the appendix hereto, APP. B, *infra.*

JURISDICTION

The Commissioner's Notice of Deficiency issued to Buchbinder on November 12, 1992, and Buchbinder filed a timely petition to the U.S. Tax Court. The Tax Court ruled against Buchbinder merely stating, without any substantial findings, that Buchbinder was raising "FRIVOLOUS AND GROUNDLESS ARGUMENTS"; the final Order and Order and Decision of the Tax Court entered on February 14, 1995. Buchbinder filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals. The Commissioner by Motion argued for dismissal of Buchbinder's Appeal for failure of Buchbinder to pay sanctions from a previous appeal numbered CA 92-70114. The order of the Court dismissing the appeal was entered on June 9, 1995. Buchbinder timely petitioned the appeal Court for Rehearing, which petition was denied by order of the Court on June 29, 1995.

Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

Authority to proceed in this Court is by authority of the people of the united States by their Constitution, Article III Section 2, Clauses 1 and 2, in which this Court has appellate jurisdiction.

STATUTORY PROVISIONS INVOLVED

Title 5 United States Codes (Government Organization and Employees)

§ 554 *Adjudications*

§ 556 *Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.*

§ 702 *Right of review*

§ 703 *Proper Venue for Court of Review*

§ 706 *Scope of review*

SPECIFICALLY

§ 554(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved -

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court; [in pertinent part]

§ 702 Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . . [in pertinent part]

§ 703 Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction . . . [in pertinent part]

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the *whole record* or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. [in pertinent part, Emphasis added] (Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 393).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to the United States Constitution

Amendment I of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V of the United States Constitution provides in pertinent part:

> No person shall.... be deprived of life, liberty, or property, without due process of law;

Amendment IX of the United States Constitution provides in pertinent part:

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals had jurisdiction pursuant to Title 26 U.S.C. § 7483. The Tax Court had jurisdiction pursuant to Title 26 U.S.C. § 6213, although Petitioner has vigorously contested the jurisdiction of the Tax Court throughout the course of these proceedings.

Petitioner Buchbinder was previously issued Notices of Deficiency from the Commissioner of Internal Revenue, the issue involved investments that Buchbinder had made. In the first deficiency action the basis for the Notice of Deficiency related to the treatment of a forward contract and certain research and development expenditures which Buchbinder claimed on his 1981 federal income tax returns and which were disallowed by the IRS. Nothing about that case involved "**WAGES**". In the second deficiency action, leading to this appeal, the basis for the Notice of Deficiency related to 6651(A) and 6659(A) penalties stemming from a re-adjustment of partnership items based upon the erroneous presumption of a previous position compromise not agreed to by Buchbinder for the year 1987.

In the first deficiency action Buchbinder challenged the validity of the Notice arguing that this was an unapportioned direct tax being imposed upon his personal property. Buchbinder argued that the rule of apportionment for direct taxes applied to personal property as well as real property *Pollock v. Farmers' Loan* S *Trust Co.,* 157 U.S. 429, 15 S.Ct. 673, aff. reh., 158 U.S. 601, 15 S.Ct. 912 (1895), and that the dividends received from invested capital was as much personal

property as the invested capital *Pollock,* supra.

Buchbinder further argued that after the ratification of the Sixteenth Amendment it was held that nothing in the Amendment repudiated the holding in *Pollock*, that a tax on real or personal property was direct and must be applied by the rule of apportionment *Brushaber v. Union Pacific Railroad Company,* 240 U.S. 1, 36 S.Ct. 236 (1915). That the term income in the Sixteenth Amendment cannot be interpreted so as to modify or repeal the original Articles of the Constitution, Congress cannot conclude what is and what is not income, and it has now become the duty of the Courts to determine on a case by case basis whether the income tax is operating as a "DIRECT TYPE TAX" or whether it is operating as an "INDIRECT TYPE TAX," giving no regard to form, but giving due regard to truth and substance *Eisner v. Macomber,* 252 U.S. 189, 206, 40 S.Ct. 189 (1920).

The Tax Court in the first case arbitrarily deemed Buchbinder's arguments *tax-protester gibberish,* without any finding that the Notice of Deficiency was valid, without jurisdictional review, without review of agency authority, or review of the constitutional issues, and upheld the Commissioner's deficiency allegation.

Buchbinder timely appealed to the Ninth Circuit Court of Appeals for a de novo review, making the same argument as above. The Commissioner in its brief argued that Buchbinder was making tax-protester arguments that *"WAGES ARE NOT INCOME,"* however the Commissioner's attorney knew, or should have known, full well that wages were not even an issue in that case, nor was that proposition ever brought before the Court.

For whatever unknown reason the Ninth Circuit adopted the Commissioner's argument, upheld the Tax Court decision, and

sanctioned Buchbinder for making a frivolous argument, which Buchbinder never actually made. Buchbinder refused to pay the sanctions and instead petitioned this Court for a Writ of Certiorari, and ultimately for a Rehearing.

The second Notice of Deficiency, which has led to this appeal, the Commissioner issued the deficiency notice for additions to tax under IRC Sections 6651(A) and 6659(A), but it involved the same tax issues as the first Notice of Deficiency. Buchbinder again timely petitioned the U.S. Tax Court raising the issues referenced herein earlier, and further contended that if the income tax is operating as an "INDIRECT TYPE TAX," as the Commissioner contends, then the Commissioner has never identified which activity is the Revenue Law taxable activity Buchbinder was involved in, nor has he ever identified which tax was due of the some 85+ internal revenue taxes authorized in the Internal Revenue Code, nor has he ever identified which revenue law of the 15 or so different revenue laws is applicable, upon which a "proper" and "valid" deficiency might have been based on to begin with. What he has identified relates to some function of the Bureau of Alcohol, Firearms and Tobacco. Buchbinder contending he had NEVER been involved in any BATF activities, or in any activity relating to Titles 5, 7, 11, 19, 20, 25, 28, 31, 38, 42, 46, 48, 32 and 34, and their related taxable activities. Therefore, Buchbinder contending the Commissioner had no jurisdiction to begin with in this case, and was completely and totally outside his jurisdiction and area of authority. Therefore, because of this procedural error, Buchbinder contending personam jurisdiction had been invoked by false pretense.

Concerning the exact nature of the Federal Income tax, Buchbinder showed that where Congress has expressly spoken on the subject, the question of interpretation is closed *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, Inc. Et. Al., (1984) 467 U.S. 837, 842; 104 S. Ct. 2778, 81 L. Ed. 2d 694.

Buchbinder showing that Congress had spoken on this matter as follows: Congressional Record, Proceedings and Debates of the 78th Congress First Session, Volume 89 Part 2, March 2, 1943, to April 5, 1943 (pages 1459 to 2940) at page 2580, where it is clearly stated:

> "The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to *certain activities and privileges* which is measured by reference to the income which they produce. The income is not the subject of the tax; it is the basis for determining the amount of the tax." [in pertinent part, Emphasis added].

Buchbinder showed it quite clear from the express wording found in the Congressional Record, that Congress rejects the theory that there is a tax levied upon income. Buchbinder showed instead, that the tax is levied upon ***certain activities***, that would fall within the powers of taxation granted to Congress by the Constitution, and is merely measured by the income generated from the taxable activity.

Buchbinder clearly showing as a matter of law and fact that he was not engaged in any activity upon which Congress had imposed a tax.

In addition to the above issue, Buchbinder further raised the issue of the Waiver filed by Respondent in Supreme Court case (Docket No. 94-620) in connection with Tax Court Docket No. 8927-92, to which the instant case is bound (APP. D).

The Tax Court, however, again entered the same arbitrary decision against Buchbinder, side stepping the waiver issue by simply noting it for the record, and contending that Buchbinder was raising frivolous and groundless arguments. None of the legal and factual issues raised by Buchbinder were given any substantial legal analysis by the Tax Court, nor was a well-

reasoned opinion and conclusion relative to these issues entered by the Tax Court. The Tax Court Judge simply ignored the Law of Taxation, the Constitution of the United States, the express will of Congress, the jurisdictional issues going to the legality of the proceedings, the Waiver and the default created thereby, and entered judgement against Buchbinder. Again, Buchbinder appealed to the Ninth Circuit Court of Appeals for a de novo review, and again the Commissioner by motion sought to have Buchbinder's appeal dismissed on the contention that Buchbinder had failed to pay the sanctions imposed by the Ninth Circuit in Buchbinder's first appeal.

REASONS FOR GRANTING WRIT

It is the customary practice in this American Society to settle the people's disputes with government agencies in the Courts, this case however is a classic example of how the doors to the very Courts who are sworn to protect the people are slowly being closed to the people.

An individual's constitutional right of access to the Courts has been upheld times innumerable. Perhaps the most comprehensive analysis of this issue can be found in the Annotation of *WHAT, IN VIEW OF SUPREME COURT, CONSTITUTES THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS,* 52 L. Ed. 2d 779. In *Gilmore v. Lynch,* 319 F. Supp. 105 (DC Cal. 1970) Affd. 404 U.S. 15, 30 L. Ed. 2d 142, 92 S. Ct. 250, the District Court, in a decision affirmed without opinion by the Supreme Court, has defined access to the Courts as encompassing "all means a *defendant* or *petitioner* might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him". Although most of the cases on this issue have involved state review procedures, the Supreme Court has indicated that the same principles are applicable to federal avenues of review.

See United States v. MacCollom, 426 U.S. 317, 49 L. Ed. 2d 666, 96 S. Ct. 2086 (1976). Moreover, these cases involved prisoners, and for the most part were habeas corpus actions. Therefore, the common everyday Citizen's constitutional right of meaningful access to the Courts would seem to be a novel question and question of first impression.

In addition to the jurisdictional defect referenced earlier, there is the question of the Respondent's waiver in face of petitioner's asserted facts and conclusions in an earlier previous Supreme Court case (Docket No. 94-620) in connection with Tax Court Docket No. 8927-92, to which the instant case is bound; the waiver issue requires careful consideration by the Court as this issue bears on the integrity and credibility of the American judicial system. It cannot be contemplated by Congress to leave its citizens without the ability to make an adequate record or to have an adequate and meaningful review of that record. Nor could Congress not have intended that those individuals have a meaningful forum for their grievances, in pursuit of redress of grievance, when the government or its agents pursue those citizens with allegations of liabilities - all unsubstantiated and unproven. Nor could Congress contemplate leaving American citizens with no adequate remedy at law for their properly brought and specifically pled issues. If such were the case this would amount to judicial usurpation of power by the lower courts, and the rights secured under the Constitution guaranteeing proper due process and redress of grievance would be abrogated. Therefore, this Court should give serious consideration to the question of the Respondent's waiver. The parties had agreed by stipulation that the outcome of the instant case would be controlled by the court's conclusions and findings in petitioner's earlier case (TC 8927-92), the controlling case; HOWEVER, the decision and opinion of the Tax Court in petitioner's earlier docketed case (8927-92) was subsequently appealed on the grounds that petitioner had not been afforded the Scope of Review mandated by Title 5, Sections 701-706,

and on infractions of Due Process. On appeal to the Supreme Court, Respondent defaulted by Waiver in that case, pre-empting further review (Estoppel in Pais/Estoppel by Laches), and prompting denial of certiorari. As such, petitioner's case (Docket No. 8927-92), the controlling case, was not fully adjudicated and the issues and questions raised by petitioner relative to Scope of Review and Due Process remained unanswered and open, petitioner left without remedy at law for his properly brought and specifically pled issues, craving for redress of grievance. The Government, pursuant to Supreme Court Rule 15.1, was obligated as Respondent to address any perceived misstatements of fact or law before the Court. The Government expressly waived its right to respond pursuant to Supreme Court Rule 15.5. Such a waiver in the face of petitioner's asserted facts and conclusions, served to leave the petitioner's allegations uncontested before the Court and leaves the Respondent unable to later act in contravention of those allegations. The Government offered no defense against the accusations made by petitioner and did not point out any perceived misstatements of law or fact *having an obligation* to do so pursuant to Supreme Court Rule 15.1. The Government specifically chose to waive that right pursuant to 15.5. Such a response is a plea of no contest entered willingly and without coercion. Respondent defaulted by tender of express waiver of its obligation to counter petitioner's version of the law and facts, thereby accepting petitioner's version of the law and facts to be true. Respondent did not correct the record as to what issues were proper to bring before the Court, and specifically did not question the basis for the petition, nor question the grounds upon which petitioner raised his questions, nor did Respondent bring to the Court's attention that petitioner raised no valid Due Process issue, nor did Respondent bring to the Court's attention that Petitioner was making assertions which had no valid basis in the record. In short, Respondent made no attempt to protect the basis he had established in the lower courts. He made no attempt to show the Court that the issues being raised were

based in frivolous and groundless argument, as he had contended in the lower courts. Instead, Respondent conceded by waiver that petitioner had indeed not received the Scope of Review mandated by Title 5, Section 706; Respondent thereby conceding that petitioner did not receive due process of law. Instead of correcting the record, the Respondent waived his right to file a Brief in Opposition, rendering rebuttal moot, and defaulting thereby. Petitioner's statements and assertions, unrebutted in the face of Rule 15.1, standing as truth, therefore rendering Respondent's rebuttal before the Court moot, even had certiorari been granted.

Subsequently in a Supplemental Brief to the Supreme Court, petitioner claimed a default-judgment against Respondent pursuant Respondent's default by waiver and further invoked an Estoppel in Pais on all further action in connection with Tax Court Docket No. 8927-92, the controlling case to which the instant case is bound; making such claim under the Common Law Rule of Reasonable Argument. *U.S. v. Schneiderman*, 102 Fed. Supp. 87 (1951) and *States S.S. Company v. Permanente S.S. Corp.*, 231 F.2d. 82 (1956). A copy of the Supplemental Brief was timely served on counsel for Respondent and counsel for Respondent failing to object in a timely fashion, conceded the validity of said claim (said claim inherent in the nature of the waiver, as in any other court such action considered a Plea of No Contest--Nolo Contendere or Non Prosequitur). Since petitioner has established a default judgment by Waiver in Supreme Court Case Docket No. 94-620 in connection with Tax Court Docket No. 8927-92, to which the instant case is bound, therefore the instant case is likewise controlled by such default-judgement.

Petitioner requests the Court to take judicial notice of the above.

CONCLUSION

This petitioner has a constitutional right under Amendment I and V of the Constitution to Due Process and Redress of Grievance, and where rights secured by the Constitution are involved, there can be no ***rule making*** or ***legislation*** which would abrogate them. *Miranda v. Arizona*, 384 U.S. 436. Therefore, this petitioner has a right to have his issues fully reviewed and adjudicated by the Highest Court in the Land, as this has been an impossibility in the lower courts. Nothing should prevent this full review and adjudication, except in lieu of re-examination by the Court, respondent's waiver acts as a default and creates an Estoppel to any further action, otherwise there is no remedy for petitioner's properly pled issues, and this would be repugnant to the Constitution, leaving petitioner at the mercy of the lower courts, and would ultimately lead to judicial usurpation of powers by the lower courts.

In *Cohens v. Virginia*, 6 Wheat. (1821) 264 at 416; the Court noted that " ... the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of DECIDING, in the last resort all cases in which they are involved" [Emphasis added]. The Court further noted that in construing the words of the Constitution, defining the judicial power, that in the true sense the Court was not bound to construe the words more restrictively than they naturally import, and that the words of the Constitution give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, Laws, and Treaties of the United States.

In their opinion at 403- 404 the Court supposed "... a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his

plea should be overruled and judgment rendered against him, his case would resemble this; and, unless the jurisdiction of this court might be exercised over it, the constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

"It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. THE JUDICIARY CANNOT, AS THE LEGISLATURE MAY, AVOID A MEASURE BECAUSE IT APPROACHES THE CONFINES OF THE CONSTITUTION. WE CANNOT PASS IT BY BECAUSE IT IS DOUBTFUL. WITH WHATEVER DOUBTS, WITH WHATEVER DIFFICULTIES, A CASE MAY BE ATTENDED, WE MUST DECIDE IT IF IT BE BROUGHT BEFORE US. We have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the constitution. QUESTIONS MAY OCCUR WHICH WE WOULD GLADLY AVOID, BUT WE CANNOT AVOID THEM. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. WE FIND NO EXCEPTION TO THIS GRANT, AND WE CANNOT INSERT ONE." [Emphasis added].

Further in *Cohens v. Virginia*, Wheat 6. at 409, the Court noted that, "A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgement was given in another court, and, on such examination, TO AFFIRM OR REVERSE the same according to law." [Emphasis added].

The court further noted at 410-411 " Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to *re-examination*. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal ... for the sole purpose of INQUIRING whether the judgment violates the constitution or laws of the United States, ... Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to affect every purpose of a writ of error. The mode of removal is form, and not substance. WHETHER IT BE BY WRIT OF ERROR OR APPEAL, no claim is asserted, no demand is made by the original defendant; he only ASSERTS the CONSTITUTIONAL RIGHT to have his defense EXAMINED BY THAT TRIBUNAL whose province it is to construe the constitution and laws of the Union". [Emphasis added].

"The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process."

At 411 the court further noted that, "If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, BUT the judgement IS TO BE re-examined, AND reversed OR affirmed, in like manner AS IF THE PARTY HAD APPEARED AND ARGUED HIS CAUSE." [Emphasis added].

The Court further noted at 383 - 384, "The constitution gave to every person ... a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, THE FRAMERS OF OUR CONSTITUTION THOUGHT IT NECESSARY, FOR THE PURPOSES OF JUSTICE, TO PROVIDE A TRIBUNAL AS SUPERIOR TO INFLUENCE AS POSSIBLE, IN WHICH THAT CLAIM MIGHT BE DECIDED ... that the judicial power of every well - constituted government must be co-extensive with the legislative, AND MUST BE CAPABLE OF DECIDING EVERY JUDICIAL QUESTION WHICH GROWS OUT OF THE CONSTITUTION AND LAWS." [Emphasis added].

As the judges in *Cohens v. Virginia* commented, "We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." (at 383).

Petitioner requests the Court to take judicial notice of the above.

Therefore, for all of the above reasons, the Court should consider granting certiorari in this case. However, if Respondent's tender of express waiver to counter petitioner's version of the law and facts, thereby accepting petitioner's version of the law and facts to be true, constitutes a default on the part of Respondent, and Respondent's failure to object in a

timely fashion to petitioner's claim of default thereby officially establishes the default, then there is no reason to grant certiorari, unless the Court wishes to invoke its appellate jurisdiction of review in order to curb abuses to litigants in the lower courts such as those abuses manifesting themselves in this case.

Respectfully submitted,

BRUCE BUCHBINDER
1178 Via Ferrari Drive
San Jose, California 95122
(408) 279-4054
Petitioner in Pro Se

DATED: September 20, 1995

APPENDIX A-- ORDER OF NINTH CIRCUIT COURT OF APPEALS.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRUCE BUCHBINDER, Petitioner-Appellant, vs. COMMISSIONER INTERNAL REVENUE SERVICE, Respondent-Appellee.	No. 95-70259 IRS# 3187-93 ORDER (Filed June 9, 1995)

Before: O'SCANNLAIN, LEAVY and HAWKINS, Circuit Judges

Appellee's motion to dismiss the appeal for nonpayment of sanctions imposed by the court in a prior appeal is granted. See Hymes v. United States, 993 F.2d 701, 702 (9th Cir. 1993).

mocal/6.6.95/re/1

APPENDIX B-- ORDER AND ORDER AND DECISION OF U.S. TAX COURT.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

BRUCE BUCHBINDER,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE ,	)	DOCKET NO. 3187-93
	)	
Respondent.	)	
	)	

ORDER AND ORDER AND DECISION

On November 28, 1994, respondent filed a Motion For Order To Show Cause Why Judgment Should Not Be Entered Against The Petitioner Pursuant To The Parties' Stipulation To Be Bound And On The Basis Of A Previously Decided Case. On December 7, 1994, the Court ordered petitioner to file a written response to respondent's motion on or before January 4, 1995. On December 29, 1994, Petitioner's Response To Respondent's Motion To Show Cause Pursuant Court Order of December 7, 1994 was filed. On January 9, 1995, the Court heard the parties' arguments on respondent's motion.

In his written submissions and upon oral argument, petitioner raised only frivolous and groundless arguments. Petitioner argued: (a) the Tax Court has no jurisdiction over

his person because there was no "excise taxable event"; (b) the Tax Court decision that was the subject of his stipulation to be bound is not final because section 7481 has no "enabling regulation" and is therefore "unenforceable"; and because the United States chose not to respond to petitioner's Supreme Court Petition For Writ of Certiorari it, in effect, agreed to the correctness of his statement of the [facts in the] case in the petition for writ (this, despite the Court's denial of certiorari). These arguments are evidence that the present proceeding was instituted primarily or solely for delay. Petitioner has been warned not to pursue frivolous and groundless arguments before this Court. Buchbinder v. Commissioner, T.C. Memo. 1990-627 and 1994-7. After due consideration, it is

ORDERED that the Court's order to show cause why judgment should not be entered against the petitioner pursuant to the parties' stipulation to be bound and on the basis of a previously decided case is rendered absolute. It is further

ORDERED AND DECIDED that there are additions to tax due from petitioner for the taxable year 1987 pursuant to I.R.C. section 6651 (a) and 6659 (a) in the amounts of $1,284 and $1,541, respectively. It is further

ORDERED AND DECIDED that there is a section 6673 penalty due from petitioner in the amount of $1,000.

/s/ John F. Dean
John F. Dean
Special Trial Judge

ENTERED: FEB 14, 1995

APPENDIX C-- COURT OF APPEALS DENIAL OF PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRUCE BUCHBINDER Petitioner-Appellant, vs. COMMISSIONER INTERNAL REVENUE, Respondent-Appellee.	No. 95-70259 TaxCt# 3187-93 ORDER (Filed June 29, 1995)

Before: O'SCANNLAIN, LEAVY and HAWKINS, Circuit Judges

Appellant's "petition for rehearing" of this court's June 9, 1995 order dismissing the appeal for nonpayment of sanctions is denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

mocal/6.26.95/re/18

APPENDIX D-- WAIVER FILED IN SUPREME COURT CASE NO. 94-620 IN CONNECTION WITH TAX COURT DOCKET NO. 8927-92, TO WHICH THE INSTANT CASE IS BOUND.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BUCHBINDER, BRUCE, ET UX., Petitioner	)	
vs .	)	No. 94-0620
CIR	)	

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the court.

DREW S. DAYS, III
SOLICITOR GENERAL

October 19, 1994

cc: BRUCE BUCHBINDER
ELAINE BUCHBINDER
1178 VIA FERRARI DRIVE
SAN JOSE,CALIFORNIA 95122

Supreme Court, U.S.
FILED
OCT 10 1995
CLERK

No. 95-483

In The

Supreme Court for the United States

October Term, 1995

BRUCE BUCHBINDER

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

BRUCE BUCHBINDER
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Petitioner In Pro Se

QUESTIONS PRESENTED

1. Should the Court grant certiorari in a case where statements of fact and law go uncontested pursuant to waiver by Respondent, wherein Respondent had an obligation to respond (Rule 15.1) and by not responding renders rebuttal moot, pre-empting any further litigation?

2. Should the Court grant certiorari in a case where statements and allegations go unrefuted, and Respondent by remaining silent, thereby admits to the same?

3. Should the Court grant certiorari when the waiver filed by Respondent pursuant to Rule 15.1 and 15.5 effectively creates an Estoppel In Pais/Estoppel In Laches, thereby preventing Respondent from any further action?

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No. 95-483

In The

Supreme Court for the United States

October Term, 1995

BRUCE BUCHBINDER

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

PRELIMINARY STATEMENT

Petitioner Bruce Buchbinder comes before this Court stating there exists an intervening circumstance of a controlling effect, not previously presented to this Court. The intervening circumstance is set forth within the body of the Brief herein.

STATEMENT OF THE CASE

On September 21, 1995, Petitioner Bruce Buchbinder filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, seeking the issuance of a supervisory opinion in review of the actions of the United States Tax Court and the United States Court of Appeals for the Ninth Circuit. The relief sought resulted from the subsequent dismissal of Buchbinder's case by the Ninth Circuit which effectively and subsequently denied Petitioner's constitutionally protected right to procedural and substantive due process, and right to meaningful access to the courts. In addition, Petitioner Buchbinder again raised the issue of the waiver filed by respondent in a case to which the instant case is bound, alleging that the lower court ignored the default and the estoppel created thereby, and thereby trampled on petitioner's Constitutional right to Redress of Grievances.

Petitioner presented a case against Respondent, complaining that the Ninth Circuit court imposed monetary sanctions for an allegation of misconduct that never actually took place coupled with a second subsequent sanction of dismissal. Petitioner stated in the Petition for Writ of Certiorari filed September 21, 1995, pages 7 and 8, that the issues in the first case (alleged misconduct) were confused by the Commissioner and that the Ninth Circuit adopted the Commissioner's confusion, sanctioning Buchbinder for a frivolous argument that Buchbinder never actually made. The first case (alleged misconduct) led to the present case (dismissal for nonpayment of sanctions), which is herewith on appeal. The instant case was dismissed on the contention that Buchbinder had failed to pay the sanction imposed by the Ninth Circuit in Buchbinder's first appeal. The Petitioner further contended that he was extremely punished by the Ninth Circuit Court of Appeals for something that he never actually did and that the punishment was so extreme that he had been substantially denied access to the

meaningful judicial review of his case.

Petitioner therefore alleged he was left without remedy in the denial of his due process rights pursuant to Title 5 U.S.C. §§ 554, 702, 703, and 706, as guaranteed by Amendment V of the United States Constitution; in the denial of his right to petition for Redress of Grievances as guaranteed by Amendment I, and in the denial of his right to meaningful access to the courts as guaranteed by Amendment IX.

Further, petitioner alleged that a default was created by waiver when respondent filed waiver in a case to which the instant case is bound.

On October 2, 1995, during pendency of petitioner's Petition for a Writ of Certiorari to this Court, the Solicitor General, Drew S. Days, III, who makes appearance and is counsel for Respondent, admitted to practice before this Court, appeared by brief and filed an express written waiver of right to file in opposition to Petitioner's asserted facts and conclusions. Respondent, in filing waiver pursuant to Supreme Court Rule 15.5, admitted and confirmed the validity and accuracy of Petitioner's statements and allegations. A copy of the waiver appears in Appendix A.

RESPONSE TO WAIVER

In his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Petitioner raised the question of whether the arbitrary dismissal of a litigant's cause of action before the courts, especially an action brought by a Pro Se litigant is the harshest sanction that can be imposed by

the courts, and whether such a sanction can rise to the level of denial of proper due process, denial of right to petition for a Redress of Grievances and denial of right to meaningful access to the courts. These questions remain unanswered in respect to the Petitioner. Petitioner also raised the question of whether the waiver filed by respondent in a case to which the instant case is bound constitutes a default concession to the validity of petitioner's claim, thus triggering Estoppel In Pais/Estoppel In Laches, and whether it attaches to the instant case. Subsequently, after failing to respond to allegations of the Petitioner that were before the Court, respondent has again defaulted pursuant waiver and is estopped from any further action in this cause.

Petitioner alleged that he had been deprived of his due process rights, deprived of his right to Redress of Grievances, and deprived of his right to meaningful access to the courts; Petitioner further alleged a default was created by waiver when respondent filed waiver in a case to which the instant case is bound; and further alleged respondent's failure to object in a timely fashion to petitioner's claim of default thereby officially establishes the default, and finally alleged that since a default has been established by waiver in a case to which the instant case is bound, therefore the instant case is controlled by such default. Again, after failing to respond to the above allegations, respondent has defaulted pursuant waiver and is estopped from any further action in this cause.

The Government, pursuant to Supreme Court Rule 15.1, was obligated as Respondent to address any perceived misstatements of fact or law before the Court. The Government expressly waived its right to respond pursuant to Supreme Court Rule 15.5. Such a waiver, in the face of Petitioner's asserted facts and conclusions, serves to leave the Petitioner's allegations uncontested before the Court and leaves the Respondent unable

to later act in contravention of those allegations.

The Government offered no defense against the accusations made by Petitioner and did not point out any perceived misstatements of law or fact *having an obligation* to do so pursuant to Supreme Court Rule 15.1. The Government specifically chose to waive that right pursuant to 15.5. Such a response is a plea of no contest entered willingly and without coercion. Respondent defaulted by tender of express waiver of its obligation to counter petitioner's version of the law and facts, thereby accepting petitioner's version of the law and facts to be true. Respondent did not correct the record as to what issues were proper to bring before the Court, and specifically did not question the basis for the petition, nor question the grounds upon which petitioner raised his petition, nor did the respondent bring to the Court's attention that petitioner raised no valid Due Process issue, nor did Respondent bring to the Court's attention that Petitioner was making assertions which had no valid basis in the record. In short, respondent made no attempt to protect the basis he had established in the lower courts. He made no attempt to show the Court that the issues being raised were based in frivolous and groundless argument, as he had contended in the lower courts. Instead, respondent conceded by waiver that petitioner had indeed not received the Scope of Review mandated by Title 5, Section 706; respondent thereby conceding that petitioner had not receive due process of law. Further, respondent has again acknowledged his default by waiver. Instead of correcting the record, respondent again waived his right to file a Brief in Opposition, rendering rebuttal moot on these issues, and defaulting again thereby. Petitioner's statements and assertions, unrebutted in the face of Rule 15.1, continue to stand as truth, thereby rendering respondent's rebuttal before the Court moot. Under the Common Law Rule of Reasonable Argument, Petitioner therefore claims a default-judgment against Respondent in the instant case and invokes an

Estoppel in Pais/Estoppel in Laches. U.S. v. *Schneiderman,* 102 Fed. Supp. 87 (1951) and *States S.S. Company v. Permanente S.S. Corp.*, 231 F.2d. 82 (1956).

CONCLUSION

Since Respondent has defaulted pursuant waiver, accepting Petitioner's version of the law and facts to be true, conceding not only that a prior default exists in a case to which the instant case is bound, but further conceding that Petitioner did not receive due process of law, there are therefore no grounds for further action in this case. The allegations are now decided in favor of the Petitioner, through default, as Respondent did not defend his position in either the instant case nor the case to which it was bound, pursuant waiver in both cases. Therefore, Respondent is enjoined from further action based on his default on these issues and Respondent's attempts to further this action are blocked by Estoppel In Pais/Estoppel In Laches.

However, Respondent's default and the estoppel created thereby does not resolve the issue of abuses to litigants in the lower courts such as those manifesting themselves in the instant case. Therefore, the Court should consider granting certiorari in this case.

Respectfully submitted,

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1178 Via Ferrari Drive
San Jose, California 95122
(408) 279-4054

DATED: October 10, 1995

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BUCHBINDER, BRUCE Petitioner	)	
vs .	)	No. 95-0483
COMMISSIONER OF INTERNAL REVENUE	)	

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the court.

DREW S. DAYS, III
SOLICITOR GENERAL

October 2, 1995

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